Supreme Court, U.S.
FILED

No. 94-95 JUL 14 1994

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Cross-petitioners,

v.

SHARON PRATT KELLY, *et al.*,
Cross-respondents.

Cross-Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

JOINT CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

JOHN M. WOOD
JOSEPH A. RIESER, JR.
REED, SMITH, SHAW & MCCLAY
1200 - 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100
Counsel for AT&T Corporation and AT&T Communications of Washington, D.C., Inc.

MITCHELL F. BRECHER
DONELAN, CLEARLY, WOOD & MASE
1275 K Street, N.W., Suite 850
Washington, D.C. 20005
(202) 371-9500
Attorney for Allnet Communication Services

WILLIAM MALONE *
MILLER, CANFIELD, PADDOCK & STONE
1225 - 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600
Counsel for Sprint Communications Company, L.P., Cable & Wireless, Inc., and LDDS Metromedia Communications Corporation

ANDREW D. LIPMAN
RUSSEL M. BLAU
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-3841
(202) 424-7500
Attorney for Mid Atlantic Telecom and Long Distance Service of Washington

* Counsel of Record

(List of Counsel Continued on Following Page)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pgs

PAUL M. TENDLER
TENDLER, GOLDBERG, BIGGINS
& GELTZER
1090 Vermont Avenue, N.W.
Suite 1200
Washington, D.C. 20005-4905
(202) 682-9000
Attorney for Metrocom

Of Counsel:

CHARLES R. WUNSCH
SPRINT COMMUNICATIONS
COMPANY, L.P.
Mailstop: KSWESA0108
2330 Shawnee Mission Parkway
Westwood, Kansas 66205
(913) 624-8361

July 14, 1994

ERIC F. FACER
ZUCKERMAN, SPAEDER,
GOLDSTEIN, TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1801
Attorney for RealCom

QUESTIONS PRESENTED

1. Whether the Constitution's requirement that all revenue bills originate in the House of Representatives applies to enactment of a new tax under Congress' delegation of general legislative authority to the D.C. Council in the Home Rule Act of 1973.

2. Whether a new tax on long distance company's gross receipts may be retroactively imposed on past calls, where one element supporting the reasonableness of the legislature's employing retroactivity was its expectation that the tax could be "passed through" to the customers, but where that expectation was frustrated by federal law and changing industry structure.

3. In a suit under 42 U.S.C. § 1983 for a declaratory judgment that a local tax was unconstitutional, which tax the court found to have been paid, whether dismissal of the suit for failure to pre-pay the tax violates the taxpayer's right under due process and 42 U.S.C. § 1983 to "plain, speedy, and efficient" post-deprivation relief.

PARTIES TO THE PROCEEDING

The cross-petitioners are taxpayers, *i.e.*, long distance telephone companies subject to the District of Columbia's gross receipts tax. They are: Sprint Communications Company, L.P.; Cable & Wireless, Inc.; LDDS Metromedia Communications Corporation; AT&T Corporation; AT&T Communications of Washington, D.C., Inc.; ALLNET Communication Services, Inc.; Metro Telecommunications Services, Inc.; Richard J. Rice, Inc.; and RealCom Office Communications, Inc. The cross-respondents are the taxing authorities, *viz.*, the Mayor, the Director of the Department of Finance and Revenue, and the District of Columbia.

RULE 29.1 LIST

Sprint Communications Company, L.P., is a limited partnership owned solely by Sprint Corporation, formerly United Telecommunications, Inc., whose stock is traded on the NYSE. Cable & Wireless, Inc., is a wholly owned subsidiary of Cable & Wireless, P.L.C., whose stock is traded on the LSE, and whose ADRs are traded on the NYSE. LDDS Metromedia Communications is a wholly owned subsidiary of LDDS Communications, Inc., whose stock is traded on NASDAQ. ALLNET Communication Services, Inc. is a wholly owned subsidiary of ALC Communications Corporation, whose stock is traded on the American Exchange. AT&T Communications of Washington, D.C., is a wholly owned subsidiary of AT&T Corporation, formerly American Telephone & Telegraph Company, whose stock is traded on the NYSE. Richard J. Rice, Inc., formerly known as Long Distance Service of Washington, Inc., Metro Telecommunications Services, Inc., and RealCom Office Communications, Inc., are privately held companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE CROSS-PETITION	7
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Barry v. AT&T, 563 A.2d 1069 (D.C. 1989) 5, 7
Barry v. Sprint et al., Nos. 87-1353 and -1354 (D.C. Sup. Ct.) (filed October 6, 1988) 5
Blodgett v. Holden, 275 U.S. 142 (1927) 13, 15
C&P Teleco v. District, (No. 1756) (D.C. Tax Ct., July 17, 1962), *aff'd in part*, 117 U.S. App. D.C. 21, 325 F.2d 217 (1963) 14
District of Columbia v. Thompson, 346 U.S. 100 (1953) 9
District of Columbia v. Carter, 409 U.S. 418 (1973) 9, 10
District of Columbia v. C&P Telephone Co., 516 A.2d 181 (D.C. 1986) 4, 12, 13
Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 9
Galveston Electric Co. v. Galveston, 258 U.S. 388 (1922) 14
Goldberg v. Sweet, 488 U.S. 252 (1989) 5
Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510 (1993) 6, 7
INS v. Chadha, 462 U.S. 919 (1983) 10
Key v. Doyle, 434 U.S. 59 (1977) 2
Maislin Industries v. Primary Steel, 497 U.S. 116 (1990) 11, 14, 15
Maryland v. U.S., 460 U.S. 1001 (1983) 4
MCI v. AT&T, 62 U.S.L.W. 4527 (U.S. Nos. 93-356 and 93-521) (decided June 17, 1994) 11, 15
McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990) 1, 6, 7
Metropolitan Washington Airports Authority v. Citizens, 111 S.Ct. 2298 (1991) 10
Mistretta v. U.S., 488 U.S. 361 (1989) 10
Nader v. FCC, 172 U.S. App. D.C. 1, 520 F.2d 182 (1975) 14
Skinner v. Mid-America Pipeline, 490 U.S. 212 (1989) 10
Stoutenburgh v. Hennick, 129 U.S. 141 (1889) 10

TABLE OF AUTHORITIES—Continued

	Page
TRT Telecommunications Corp. v. FCC, 273 U.S. App. D.C. 97, 857 F.2d 1535 (1988)	14
Tyler Pipe Industries v. Washington Dept. of Revenue, 483 U.S. 232 (1987)	1
U.S. v. AT&T Co., 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983)	4
U.S. v. Carlton, 62 U.S.L.W. 4472 (U.S. No. 92-194) (decided June 13, 1994)	13, 15
U.S. v. Hemme, 476 U.S. 555 (1986)	13
U.S. v. Muñoz-Flores, 495 U.S. 385 (1990)	8
U.S. v. Norton, 1 Otto (91 U.S.) 566 (1875)	8
US Sprint v. District of Columbia	8
Untermyer v. Anderson, 276 U.S. 440 (1928)	13, 15
Welch v. Henry, 305 U.S. 134 (1938)	12
CONSTITUTIONAL PROVISIONS AND STATUTES	
Constitution, Article I, Section 7	10
Constitution, Article I, Section 8, Clause 17	9
Constitution, Article IV, Section 3, Clause 2	9
26 U.S.C. § 2057	13
28 U.S.C. § 1257(a)	2
28 U.S.C. § 1341	15
Tax Anti-Injunction Act, 28 U.S.C. § 1341	7
28 U.S.C. § 2113	2
42 U.S.C. § 1983	i, 3, 16
Communications Act, 47 U.S.C. § 203(a)	11
D.C. Home Rule Act, 87 Stat. 774 (1974)	*passim*
12 Car. II, c.4 ¶ VI (1660)	9
22-23 Car. II, c. XVII ¶ VII (1670)	9
D.C. CODE	
Section 1-204	3, 9
Section 1-233(c)(1)	10
Section 47-501	10
Section 47-504	10
Section 47-2501	4
Section 47-3307	5

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
99 Cong. Rec. 1897-98 (March 12, 1953)	9
District of Columbia Tax Study, H. Doc. No. 108, 76th Cong., 1st Sess. 97 (1939)	12
ADMINISTRATIVE DECISIONS	
AT&T Communications, 2 F.C.C. Rcd 7573 (1987) (Bureau)	12
AT&T Communications, 60 R.R.2d 468 (1986)	11
Wallace Communications v. AT&T, 6 F.C.C. Rcd 1618, 68 R.R.2d 1650 (1991)	11
OTHER MATERIALS	
"Financial Status of District of Columbia Finances" GAO/AIMD/GGD-94-172BB Rpt. B-257550 (June 22, 1994)	8, 10
VI Cannon's Precedents of the House § 316 (GPO 1935)	9
2 Story: Commentaries on the Constitution (1833)	9
1 Blackstone's Commentaries 170 (1765)	9
3 Dreschler's Precedents § 13 (H. Doc. 94-661) (GPO 1974)	10
Jefferson's Manual, H. Doc. 98-277 (GPO 1985)	10
Report of the D.C. Council's Committee on Finance and Revenue on Bill 7-186, "Gross Receipts Amendments Act of 1987 (1987)	11
D.C. Superior Court Civil Rule 15	6, 15, 16
FRCP 15(b) and (d)	7, 15, 16
Notice of Proposed Rulemaking, 34 D.C. Register 5791 (September 4, 1987)	13
Regulations, D.C. Register (September 25, 1987)	10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Cross-petitioners,

v.

SHARON PRATT KELLY, *et al.*,
Cross-respondents.

Cross-Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

JOINT CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

In No. 93-1987 the District of Columbia and its officer-defendants below have sought review by this Court of the decision of the D.C. Court of Appeals, which invalidated the District of Columbia's gross receipts tax as unconditionally discriminating against interstate commerce. Specifically, the District defendants urge that the D.C.C.A. was not required to invalidate the tax solely because it failed to pass "the internal consistency test enunciated in *Tyler Pipe Industries* v. *Washington Dept. of Revenue*, 483 U.S. 232 (1987)." (Pet. at i). The D.C.C.A. had remanded the case to the trial court, pursuant to *McKesson Corp.* v. *Division of Alcoholic Beverages*, 496 U.S. 18 (1990), for consideration of a remedy eliminating the impermissible discrimination. (App. 26)

Cross-petitioners oppose the District's petition as premature.

If, however, this Court should grant certiorari to hear the Commerce Clause issue, then at the same time it should review the whole case. A ruling in cross-petitioners' favor on any of the origination clause and due process issues by this Court in the case would produce a different measure of damages that would likely be more favorable to cross-petitioners than would the measure that would result from consideration of the Commerce Clause issue alone.

OPINIONS BELOW

The decision of the D.C. Court of Appeals, dated March 15, 1994, is identified in the petition for certiorari in No. 93-1987 at 1 and printed in the appendix thereto at 1-27. It is not yet reported. The unreported decision of the Tax Division of the Superior Court of the District of Columbia, dated February 19, 1992, is printed in petitioners' appendix at 30-51.

JURISDICTION

The judgment of the D.C. Court of Appeals was entered on March 15, 1994, and cross-respondents filed their petition for certiorari on June 13, 1994. The Court has jurisdiction under 28 U.S.C. § 1257(a). *See* 28 U.S.C. § 2113; *Key* v. *Doyle*, 434 U.S. 59, 68 (1977) (same review as state courts). Cross-petitioners received mail service on June 15.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

Article I, Section 7, of the Constitution reads in pertinent part as follows:

> cl. 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

cl. 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. * * *

The statutes involved, besides those reproduced in the appendix to the petition for certiorari in No. 93-1987, are as follows:

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

D.C. Code, § 1-204 Legislative Power

Except as provided in §§ 1-206, 1-233, and 47-313, the legislative power of the District of Columbia shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

(87 Stat. 784 [1973]).

STATEMENT OF THE CASE

"In its haste to address the revenue loss" under the 1902 gross receipts tax on local utilities in the wake of the AT&T divestiture,[1] the District on July 17, 1987, adopted a new[2] gross receipts tax on competitive long distance telephone companies. "[T]he tax was imposed retroactively beginning July 1, 1986." (Notice, 34 *D.C. Register* 5791 [September 4, 1987])

Cable & Wireless paid the first installment of the tax.[3] Cable & Wireless and other long distances carriers—

---

[1] *U.S.* v. *AT&T Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland* v. *U.S.*, 460 U.S. 1001 (1983). As a result of divestiture, the charges for long distance charges of service provided with AT&T were no longer revenues from joint through service, attributable as such to the local Bell operating company as utility revenues and therefore subject to the District's utility tax. *See D.C.* v. *C&P Telephone Co.*, 516 A.2d 181 (D.C. 1986). The charges for long distance service provided by the companies competing with AT&T, however, had never been subject to the utility tax.

[2] Emergency Legislation Act 7-54, D.C. Code sec. 47-2501 (1988 supp.) (July 17, 1987): "Beginning July 1, 1986, each telecommunication company not subject to the [1902] tax . . . shall: . . . pay to the Mayor 6.7% of these gross receipts . . . ." (App. 77)

TRO Order at 3 (12/3/87) "The facts before the Court reveal a new and first-time legislation, initially passed as an emergency legislation (Act 7-54) requiring the imposition, retroactively to July 1, 1986, of a gross receipts tax at the rate of 6.7% on certain telecommunications companies engaged in the providing of interstate and foreign toll telephone service."

Mayor Marion Barry's April 3, 1987 letter to Council Chairman David A. Clarke in which he states "purpose of the bill is to impose the District of Columbia gross receipts tax on gross receipts from the sale of commodities and services by all telecommunications carriers in the District of Columbia . . ."

[3] The fact of Cable and Wireless's prepayment was conceded by the District, and Judge Sullivan so found in his order of June 6, 1991.

excluding MCI who received more favorable tax treatment because its headquarters was located in the District of Columbia—then brought suit in the Civil Division of the Superior Court for a declaratory judgment that the tax was unconstitutional on three grounds: [4]

> 1) The tax discriminated against interstate commerce in violation of the negative Commerce Clause;
>
> 2) The tax did not originate in the U.S. House of Representatives as required by the Origination Clause of the Constitution; and
>
> 3) The tax was unconstitutionally retroactive because the long distance companies were foreclosed by federal law and by industry constraints from recovering the tax from their customers.

Seeking to coerce further payments, the District threatened to distrain the companies' equipment used to provide interstate communications service. The Superior Court entered a TRO against distraint and a preliminary injunction against collection of the tax on December 3, 1987. The District filed an interlocutory appeal, and the D.C.C.A. remanded the case to the trial court for further findings to support the preliminary injunction. *Barry* v. *Sprint et al.*, Nos. 87-1353 and -1354 (filed October 6, 1988). On November 14, 1988, the trial judge entered a final order holding the tax unconstitutional because it was retroactive, unduly burdensome and improperly apportioned. On appeal the D.C.C.A. reversed and remanded on the procedural ground that the carriers had not alleged prepayment of the tax under D.C. § 47-3307, which statute the court, departing from past precedents, reinterpreted to require the taxpayer to "pay first and litigate later" in such cases. *Barry* v. *AT&T*, 563 A.2d 1069 (1989) (App. 52).

---

[4] Additional grounds were abandoned after the District retroactively enacted certain curative amendments following this Court's decision in *Goldberg* v. *Sweet*, 488 U.S. 252 (1989).

Thereupon, the long distance companies paid the balance of the taxes assessed under the 1987 Act and petitioned for judicial refunds. Cable & Wireless and the other non-AT&T plaintiffs also moved to amend their original complaint under Superior Court rule 15, which is identical to FRCP 15. The motion to amend was never ruled on, and the original complaint was dismissed on June 6, 1991. These refunds were denied on the merits by the Tax Division of the Superior Court on February 18, 1992. (App. 28-51) The long distance companies appealed both dismissals.

The D.C.C.A. reversed the decisions of the Superior Court (App. 28), holding that the gross receipts tax violated the silent Commerce Clause. The D.C.C.A. also held that the origination clause was not applicable to the legislation under the District's Home Rule Act, 87 Stat. 774 (1973), but declined to rule on the long distance companies' retroactivity and Rule 15 arguments. (App. 1-27)

The D.C.C.A. remanded the appeals to the Superior Court without

> enter[ing] judgment for appellants, however, "because federal law does not necessarily entitle them to a refund," and the District of Columbia may "create[] in hindsight a nondiscriminatory scheme." *Harper* v. *Virginia Dept of Taxation, supra,* 113 S. Ct. at 2519-20 (dictum) (citing *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, supra,* 496 U.S. at 40).

(App. 26) The potential effect of the D.C.C.A.'s disposition is to reduce the amount of the long distance companies' damages and interest, because, *inter alia*, if the tax were unconstitutional under the Origination Clause and for the months that the tax were unconstitutionally retroactive under the Due Process Clause, the carriers would be entitled to no less than total refunds of the taxes paid, with interest.

REASONS FOR GRANTING THE CROSS-PETITION

1. Grant of the District's petition alone would not dispose of the whole case. Such a limited grant would leave outcome-determinative issues of law unresolved. Whether this Court were to affirm or reverse the D.C.C.A.'s holding on the Commerce Clause question identified in the District's petition in No. 93-1987, the long distance companies would press their claims on the existing record for a total refund of the taxes paid, with interest, on the origination clause, retroactivity, and Rule 15(b) points. The amount of such a recovery would likely exceed the lower amount recoverable under *McKesson Corp.* v. *Division of Alcoholic Beverages,* 496 U.S. 18, 40-41 (1990), under the Commerce Clause count in No. 93-1937. Thus, if on remand the courts below were to enter a final judgment for less than a total refund of the taxes paid with interest, the long distance companies thereupon would likely seek certiorari on the issues presented by the present record but not encompassed within the District's petition in No. 93-1987.

The bifurcation of the case, resulting from grant of only the District's petition, would inevitably introduce delay. Further delay would deny the long distance companies the quick, speedy, and efficient post-payment remedy to which they are entitled. *See* Tax Anti-Injunction Act, 28 U.S.C. § 1341 ("plain, speedy and efficient remedy" for post-deprivation tax challenges). The first complaint in these cases was filed over six-and-a-half years ago, on October 7, 1987. Plaintiffs were denied prepayment relief in *Barry* v. *American Tel. & Tel. Co.,* 563 A.2d 1069 (D.C. 1989). "The Due Process Clause . . . obligates the State to provide meaningful . . [post-deprivation] relief . . ." *Harper* v. *Virginia Dept. of Taxation,* 113 S. Ct. 2510, 2519 (1993), quoting *McKesson, supra,* at 31.

Moreover, delay threatens the cross-petitioner's ability to collect meaningful refunds of the unconstitutional tax.

The District's potential refund liability is substantial and is continuing to mount. Cross-petitioners' potential recovery is not secured, the Superior Court having denied cross-petitioners' motion for leave to pay the tax into court.[5] The General Accounting Office has reported to Congress that the District's financial position is increasingly precarious.[6] In the absence of grant of this conditional cross-petition, the resulting delay attendant on a two-step determination of the District's total liability would increase cross-petitioners' risk of not being made whole.

2. The highest court of the District of Columbia has considered the application of the Origination Clause of the Constitution to the enactment of a new tax by the District and has ruled against the application of the Constitutional provision. The 1987 legislation was demonstrably "a bill for raising revenue", and the courts have a duty to adjudicate the constitutionality of such legislative enactments on complaint of the payor. *U.S.* v. *Muñoz-Flores,* 495 U.S. 385, 393 (1990). The Court in *Muñoz-Flores* rejected the government's contention that taxpayers' challenges based on the origination clause were not justiciable.

The ruling below fails to reflect pertinent decisions of this Court. This Court in *U.S.* v. *Norton,* 1 Otto (91 U.S.) 566, 569 (1875), observed that the meaning of the Origination Clause has been well-settled by practical construction. The Origination Clause itself has always been understood by both houses of Congress to apply to

---

[5] Order, *U.S. Sprint* v. *District of Columbia,* (D.C. Sup. Ct.) (July 11, 1989) (order denying Plaintiff-carriers' Motion for Leave to Make Deposits in Court).

[6] "Financial Status of District of Columbia Finances," GAO/AIMD/GGD-94-172BR Rpt. B-257550, at 2 (June 22, 1994) ("District is faced with both unresolved long-term financial issues and continual short-term financial crises").

D.C. taxes. Recent practice establishes that money bills for the District of Columbia are subject to the Origination Clause. 99 *Cong. Rec.* 1897-98 (March 12, 1953) (House votes to refuse and to return a Senate bill making an appropriation).[7]

As a general matter Congress cannot evade the origination requirement by delegation of taxing authority. The Home Rule Act of 1973, which originated in the Senate and here under which the District claims to have acted, is no exception. Any legislative "delegation by Congress to the District of Columbia . . . [is] subject of course to constitutional limitation. . . ." *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 109 (1953). Indeed, Congress in D.C. Code § 1-204 specifically limited its delegation of legislative power to the D.C. Council to acts "consistent with the Constitution". Unlike Article IV, Section 3, clause 2, giving Congress the power to legislate for territories, Article I, Section 8, Clause 17, giving Congress exclusive legislative jurisdiction over the District, does not override the origination clause. The District, of course, is not a territory, *see District of Columbia* v. *Carter*, 409 U.S. 418, 424-25, 432 (1973), and Congress does not legislate for it under Article IV.[8] The

---

[7] *See, generally,* VI Cannon's Precedents of the House § 316 at 449-50 (GPO 1935). In this respect the American practice follows that of Parliament from 1407 to 1911. *See* 2 Story: Commentaries on the Constitution § 872 (1833), quoting 1 Blackstone's Commentaries 170 (1765) ("bills, by which money is directed to be raised upon the subject for any purpose . . . and collected from the kingdom in general . . . or . . . *in any particular district* . . ." [emphasis supplied]). By the time of the American Revolution, it was well-established that the City of London could not levy an excise tax without consent of the Commons (12 Car. II, c.4, ¶ VI) (1660), and that even the imposition of highway and sewer taxes by the capital city required a specific act of Parliament (22-23 Car. II, c. XVII, ¶ VII (1670).

[8] The District and the territories are not to be treated alike, since "the sources of Congressional authority with respect to them are entirely different." *Examining Board* v. *Flores de Otero*, 426

Origination Clause has consistently been held to apply to legislative bills delegating tax authority. *See* 3 Deschler's Precedents § 13 (H.Doc. 94-661) (GPO 1974); *cf.* Jefferson's Manual, H.Doc. 98-277, at 43 (GPO 1985).

The Congress' reservation of veto power over D.C. legislation, D.C. Code § 1-233(c)(1), does not validate the delegation of legislative authority. The exercise of Congressional "power [is] subject to the carefully crafted restraints spelled out" in Article I, Section 7. *See INS* v. *Chadha,* 462 U.S. 919, 959 (1983); *Metropolitan Washington Airports Authority* v. *Citizens,* 111 S.Ct. 2298, 2311 (1991). While the Origination Clause does not constrain Congress' power to delegate once a tax has been properly originated and enacted,[9] as in the case of D.C. Code §§ 47-501 (property tax rates) and 47-504 (other enumerated tax rates), the application of the gross receipts tax to the petitioners was never legislated by Congress.

The Origination Clause question is one of increasing significance to financial stability of the District.[10] The question presented by the gross receipts tax is a substantial one and should not be deferred to a time later than the Court's consideration of the Commerce Clause question presented by the tax.

3. The District's 1987 gross receipts tax violates the due process clause of the Constitution for the periods it was retroactive.[11] The D.C.C.A. declined to decide this

---

U.S. 572, 596 n.27 (1976); *Stoutenburgh* v. *Hennick,* 129 U.S. 141, 147, 149 (1889); *District of Columbia* v. *Carter, supra,* at 423-24 & n.9.

[9] *See Skinner* v. *Mid-America Pipeline,* 490 U.S. 212, 218, 221 1989), *citing Mistretta* v. *U.S.,* 488 U.S. 361, 371-79 (1989).

[10] *See GAO Report No. B-257550, supra* at n.6.

[11] The tax is indisputably retroactive in fact. Though nominally effective July 1, 1986, the tax was not enacted until July 17, 1987, and the regulations implementing it were not published in the

question (App. 4 n.2), even though the measure of damages on this ground could likely be different from the measure of damages on the Commerce Clause ground, which the Court decided. Irrespective of the D.C.C.A.'s resulting holding confining the long distance companies' remedy to the elimination of the impermissible discrimination against interstate commerce, the taxpayers are entitled to refund of the portions of the tax they paid that they could not pass on to their customers retroactively.

In imposing the new tax on long distance companies, the District's Council avowedly intended that the companies be able to pass along the tax to their customers, in accordance with the FCC's ruling in *AT&T Communications,* 60 R.R.2d 468, 480-82 (1986).[12] The Council failed to realize that the pass-through feature of the tax was not possible retroactively—as a practical matter, because the long distance market was highly competitive and contemporaneous data to permit back-billing was unavailable, and as a legal matter, because Section 203(a) of the Communications Act, 47 U.S.C. § 203(a), required such surcharges to be tariffed *in advance. See Wallace Communications* v. *AT&T*, 6 F.C.C. Rcd 1618, 1619, 68 R.R.2d 1650, 1653 (1991) ("imposition of a gross receipts tax surcharge on the end user [before tariffing] was a violation of Section 203 of the Act"); *Maislin Industries* v. *Primary Steel,* 497 U.S. 116 (1990); *MCI* v. *AT&T,* 62 U.S.L.W. 4527 (U.S. Nos. 93-356 and 93-521, decided June 17, 1994). The long distance

---

D.C. Register until September 25, 1987. The District admitted that the tax was retroactive up until August 31, 1987; Judge Barnes found the tax to be unconstitutionally retroactive; and Senior Judge Doyle held there to be no factual dispute as to the tax's retroactive features" (App. 49). Though the Council intended the tax to be passed through to telephone customers, AT&T did not receive permission from the FCC to do so until December 30, 1987.

[12] *See* Report of the D.C. Council's Committee on Finance and Revenue on Bill 7-186, "Gross Receipts Amendments Act of 1987" at 7 (1987).

companies, of course, were bound by federal law under the Supremacy Clause. AT&T, for example, did not receive federal permission to pass the tax through until the end of 1987. *See AT&T Communications*, 2 F.C.C. Rcd 7573, 7576 n.2 (1987) (Bureau).

When the tax was proposed in the Spring of 1987, the long distance industry attempted to warn the District that its procrustean attempt to impose a gross receips tax—traditionally imposed in a monopoly utility context [13]—on a competitive industry instead of a sales tax was inappropriate. "In its haste to address its revenue loss following the [1986] *C&P* decision," Judge Barnes found, the District enacted a fundamentally flawed tax. (November, 1988, decision at 28) The industry's warnings were fully justified in the light of actual experience. Certainly the District would never have attempted to collect an avowed sales tax retroactively on past sales, yet this is the economic effect of what it did here.[14] In the end the District conceded before Judge Doyle that "the pass-through method is not apparently an appropriate means to recover the retroactive portion of this tax." Memorandum, filed November 15, 1991, at 40.

The trial judge properly recognized that the basic principles for determining whether or not a tax was unconstitutionally retroactive were set forth in *Welch* v. *Henry*, 305 U.S. 134 (1938).[15] The tax was unduly harsh and oppressive under *Welch* v. *Henry* to the extent that it

---

[13] *See District of Columbia Tax Study*, H.Doc. No. 108, 76th Cong., 1st Sess. 97 (1939) ("monopolistic privilege").

[14] The District in its November 1991 Memorandum to the trial court at 23 conceded that the 1987 gross receipts tax "was laid on receipts from sales . . . in the District."

[15] There was no doubt as to the tax's retroactivity. Judge Barnes found the tax to be unconstitutionally retroactive (November, 1988 Order at 21), and Senior Judge Doyle held there to be no factual dispute as to the tax's "retroactive features." (App. 49).

could not be passed through for nearly a year-and-a-half because of its retroactivity.[16]

The congressional legislation approved in the Court's recent decision in *U.S.* v. *Carlton,* 62 U.S.L.W. 4472 (No. 92-1941, decided June 13, 1994), is readily distinguishable. There the Congress had promptly amended the language of an existing tax "to correct what it reasonably viewed as a mistake in the original 1986 version. . . ." The Court observed that "there is little doubt that the 1987 amendment to § 2057 was adopted as a curative measure." *Id.* at 4474. There the *only* way such evasion could be attacked was retroactively.

The Court in *Carlton,* quoting *U.S.* v. *Hemme,* 476 U.S. 555, 568 (1986), was careful to maintain the constitutional distinction between the validity of *Blodgett*[17] and *Untermyer,*[18] which addressed "situations involving 'the creation of a wholly new tax,' " on the one hand, and instances involving an adjustment in a tax already in force, on the other. *Id.* at 4475.

Here "a gross receipt tax was imposed for the first time on certain telecommunications companies . . .,"[19] most of which companies' payments to the local utility, C&P Telephone Company, had not previously been subject to the gross receipts tax levied on telephone companies.[20]

---

[16] Here, the District could have offset its revenue loss by amending the existing gross receipts tax on the monopoly local telephone company to expressly include its receipts from long distance access charge or by imposing a new tax on a going-forward basis.

[17] *Blodgett* v. *Holden,* 275 U.S. 142 (1927).

[18] *Untermyer* v. *Anderson,* 276 U.S. 440 (1928).

[19] Notice of Proposed Rulemaking, 34 *D.C. Register* 5791 (Sept. 4, 1987).

[20] *See* letter from Mayor to Chairman of D.C. Council, dated April 3, 1987.

The then-existing statute providing for the taxation of "utility" service, not competitive telecommunications services offered by

Judge Barnes found that "the facts before the Court reveal a new and first-time legislation." (TRO, December 3, 1987, at 3).

The retroactive feature of the tax unreasonably deprived the long distance companies of opportunities to alter their behavior in several ways, *e.g.*, by surcharging their rates to pass-through the tax to their customers, as contemplated by the District's Council when it adopted the tax, or to move their personal property to take advantage of the retroactive, personal property and use tax credits. After enactment, it was both *legally* and *factually* impossible for the long distance companies to go back and surcharge past long distance calls, because of *Maislin* [21] and because the non-AT&T long distance companies were neither required nor able to record data to determine which past calls were subject to the tax. In fact, as testimony from the District's witness and from the witness from the local exchange carrier, C&P Telephone Company, demonstrated, during the retroactive period C&P

---

non-utilities. *See C&P Teleco* v. *District*, No. 1756 (D.C. Tax Ct. July 17, 1962), *aff'd in part*, 117 U.S.App.D.C. 21, 325 F.2d 217 (1963).

[21] The "venerable rule" against retroactive rate adjustments, working "in tandem with the similarly well-established 'filed rate doctrine' ", dictates that only rates on file can be given effect, *TRT Telecommunications Corp.* v. *FCC*, 273 U.S.App.D.C. 97, 108, 857 F.2d 1535, 1547 (1988), and therefore the rates previously charged for the services during the period of retroactivity cannot later be increased. The District's own expert witness admitted at trial that the FCC would not allow recovery of retroactive costs.

Taxes on past service could not be recovered in future rates under the "cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the commission prescribe rates on that principle." *Nader* v. *FCC*, 172 U.S.App.D.C. 1, 20, 520 F.2d 182, 202 (1975), citing *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388, 395 (1922). Because of the unstable and price-competitive characteristics of the long distance market, it would equally have been impossible for the long distance companies to raise future prices to cover past costs.

did not provide data on jurisdictional origin of non-equal-access calls to the non-AT&T long distance companies.

The retroactivity issue in this case is particularly appropriate for decision by this Court. The case presents an interplay of the Due Process clause, the tension between *U.S.* v. *Carlton* and the earlier *Blodgett-Untermyer* line of authority that *Carlton* specifically preserves, and the tension between the states' ability to tax carriers and the federal "filed rate doctrine," reflected in Section 203(a) of the Communications Act and this Court's decisions in *Maislin* and *MCI* v. *AT&T, supra.*

4. The District has failed to provide the non-AT&T cross-petitioners with a "plain, speedy, and efficient" post-deprivation remedy for imposition of an unconstitutional tax. *See* 28 U.S.C. § 1341. Although the District conceded, and Judge Sullivan found, that cross-petitioner Cable & Wireless had in fact pre-paid the first statutorily prescribed installment of the gross receipts tax, the Superior Court dismissed the cross-petitioners' amended complaint for declaratory ruling. The D.C.C.A. did not rule on this ground of appeal. (App. 4 n.2)

The dismissal of the complaint was on the ground that the pre-payment had occurred after the original complaint had been filed, October 7, 1987, but before the first amended complaint had been filed, November 13, 1987. The Superior Court failed to rule on cross-petitioners' motion under Rule 15 to amend the complaint to show pre-payment. Cross-petitioner Cable & Wireless relied on Civil Rule 15(b), and the remaining non-AT&T cross-petitioners relied on Civil Rule 15(d), which are identical to FRCP 15(b) and (d).[22] By its terms, motions under Rule 15(b) may be made "at any time,

---

[22] Rule 15(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them

even after judgment," and Cable and Wireless' amendments under Rule 15(b) would have related back under Rule 15(c).

The failure of the courts below to allow amendment of the complaint under Rule 15 arbitrarily denied cross-petitioners the benefit of a normal incident of litigation without justification. This denial materially impaired cross-petitioners' right to judicial vindication post-deprivation of their rights under the due process clause of the Constitution and 42 U.S.C. § 1983.

---

to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; . . . .

Rule 15(d) Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of claim for relief or defense . . . .

CONCLUSION

In the event the Court should grant the District's petition for certiorari in No. 93-1987, the Court should bring the entire case before it by granting this cross-petition.

Respectfully submitted,

JOHN M. WOOD
JOSEPH A. RIESER, JR.
REED, SMITH, SHAW & MCCLAY
1200 - 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100
Counsel for AT&T Corporation and AT&T Communications of Washington, D.C., Inc.

MITCHELL F. BRECHER
DONELAN, CLEARLY, WOOD & MASE
1275 K Street, N.W., Suite 850
Washington, D.C. 20005
(202) 371-9500
Attorney for Allnet Communication Services

PAUL M. TENDLER
TENDLER, GOLDBERG, BIGGINS & GELTZER
1090 Vermont Avenue, N.W.
Suite 1200
Washington, D.C. 20005-4905
(202) 682-9000
Attorney for Metrocom

Of Counsel:

CHARLES R. WUNSCH
SPRINT COMMUNICATIONS COMPANY, L.P.
Mailstop: KSWESA0108
2330 Shawnee Mission Parkway
Westwood, Kansas 66205
(913) 624-8361

WILLIAM MALONE *
MILLER, CANFIELD, PADDOCK & STONE
1225 - 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600
Counsel for Sprint Communications Company, L.P., Cable & Wireless, Inc., and LDDS Metromedia Communications Corporation

ANDREW D. LIPMAN
RUSSEL M. BLAU
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-3841
(202) 424-7500
Attorney for Mid Atlantic Telecom and Long Distance Service of Washington

ERIC F. FACER
ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1801
Attorney for RealCom

* Counsel of Record

July 14, 1994